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IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1950. No.

PATRICK CAVANAUGH, THOMAS L. MAGUIRE, JAMES BANNON, PETER GERAGHTY, CARL AMANN, JAMES BRADLEY, JOHN BROLLY, JOHN J. BYRNE, JOHN P. CRANE, DAVID CHABROW, HUGH DOUGHERTY, DENNIS DUNN, MICHAEL FLOOD, DANIEL J. MCCARTNEY, MICHAEL J. MCGILLIN, EMMETT MCGINN, MICHAEL MCGINN, J. RUSSELL RICKENBACH, JOHN A. STRETCH, EWALD ZIELENBACH, JOHN O'DONNELL, THOMAS A. GALLAGHER, FREDERICK RIEGEL, HARRY MCCLOSKEY, VINCENT DAPSIS,

Petitioners,

v.

FREDERICK T. GELDER, CHARLES C. MCGOVERN, and FRANK D. ARMSTRONG, constituting and comprising the PENNSYLVANIA LIQUOR CONTROL BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, Patrick Cavanaugh, Thomas L. Maguire, James Bannon, Peter Geraghty, Carl Amann, James Bradley, John Brolly, John J. Byrne, John P. Crane, David Chabrow, Hugh Dougherty, Dennis Dunn, Michael Flood, Daniel J. McCartney, Michael J. McGillin, Emmett McGinn, Michael McGinn, J. Russell Rickenbach, John A. Stretch, Ewald Zielenbach, John O'Donnell, Thomas A. Gallagher, Frederick Riegel, Harry McCloskey, Vincent Dapsis, pray that a Writ of Certiorari issue to review the final decree of the Supreme Court of Pennsylvania, dismissing a bill in equity, entered in the above-entitled case on March 20, 1950 with respect to which a Petition for Reargument was presented and refused as is hereinafter set forth.

OPINIONS BELOW.

The opinion of the Supreme Court of Pennsylvania is reported in Volume 364, Pennsylvania State Reports (Pa.) at page 361.

The opinion of the Court of Common Pleas of the County of Dauphin, State of Pennsylvania, is not reported. The said opinion is set forth in the Record pp. 32a to 50a.

JURISDICTION.

The final decree of the Supreme Court of Pennsylvania, the highest court of the Commonwealth of Pennsylvania, was entered on March 20, 1950. Pursuant to the rules of the said court, a Petition for Reargument was filed on April 2, 1950, and was refused on April 11, 1950.[1] The jurisdiction of this court is invoked under 28 U. S. C. #1257(3).

The federal questions sought to be reviewed were raised in the Court of Common Pleas of the County of Dauphin, the court of first instance, and in the appellate court, the Supreme Court of Pennsylvania, and passed upon by the said courts in the following manner:

(a) The contention that the amusement permit fee of $120.00 required for television reception from the petitioners by the respondents under the provisions of the Pennsylvania Liquor Control Act[2] and the regulation adopted by the respondents with respect to television reception,[3] deprived the petitioners of their property without due process of law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States, was raised in the petitioners initial and only pleading a bill in equity, by specific reference to the said section and Amendment in paragraph 39 of the bill (R. 14a), supported by numerous allegations of fact establishing the said deprivation, principally: that the respondents had no power or author-

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[1] "Petitions for Reargument must be made before the record is returned to the court below."—Rule 48 of the Rules of the Supreme Court of Pennsylvania. The record was returned on April 17, 1950. (R. 53)

[2] Paragraph (14) of Section 602 of the Pennsylvania Liquor Control Act of November 29, 1933, P. L. 15 (Spec. Sess. 1933-1934) as amended (47 Purdons Digest No. 744-602) printed as appendix B, infra. p. 21.

[3] Regulation adopted March 3, 1947, printed as appendix C, infra. pp. 22-23; and R. 4a.

ity over television reception (R. 8a), that television was regulated in the public interest by the Communications Commission of the United States (R. 8a); that the respondents have neither performed or had occasion to perform any act or to expend any sum whatsoever for the purpose of regulating and supervising television reception (R. 9a, pars. 23 and 25), and that the collection of the fees would exceed the total expended by the respondents for all licensing purposes and for the enforcement of all the liquor laws of the Commonwealth, both as respects licensees and the public in general (R. 13a).

Reference to the said federal question is made in the opinion of the Court of Common Pleas (R. 35a and 43a) and petitioners' contentions rejected.

In the Supreme Court of Pennsylvania, the said federal question was directly raised in the "Statement of Questions to be Argued Under Rule 22" (R. 54), which statement by Rule of the Supreme Court of Pennsylvania is submitted in lieu of assignments of error. Cognizance of the said federal question is taken by the Supreme Court of Pennsylvania in its decision (R. 57) and petitioner's contentions made with respect to the said federal question rejected.

In the Petition for Reargument (R. 63, 64, 65), it was alleged that the Supreme Court of Pennsylvania ignored the basic and material allegations of fact respecting the deprivation of the petitioners' property, and the petitioners sought to have specifically reargued the question whether in the absence of regulation and supervision of television, and in the absence of moneys actually expended by the respondents, the respondents could exact a permit fee contrary to Section One of the Fourteenth Amendment, as said provision was construed and applied in principle in the case of Postal Telegraph Cable Co. v. Taylor, 192 U. S. 64, reversing 202 Pa. 583.

(b) The contention that under the Communications Act of 1934, there had been a plenary exercise by Congress over

television broadcasting and reception, so as to preclude and prohibit any exercise by the respondents of the licensing of television reception; as being contrary to the said Act and Section 8, Clause 3, Article I of the Constitution of the United States was raised in the petitioners' pleading by the allegations, setting forth the nature of television broadcasting (R. 6a, par. 10); that the broadcasts are made by persons specifically licensed for the said purpose by the Federal Communications Commission under the Communications Act of 1934, (R. 6a, par. 12); that a portion of the programs and the primary devices by which they are located are beyond the political boundaries of the Commonwealth of Pennsylvania, but originate and are located in other states of the United States (R. 8a, par. 17); that television broadcasts are regulated and supervised in the public interest by the Federal Communications Commission (R. 8a, par. 20); and that it is not within the power or authority of the respondents to regulate or supervise in any manner television broadcasts or the reception thereof (R. 8a, par. 22).

The Court of Common Pleas of Dauphin County made passing reference to the authority of the Communications Act of 1934 and that the respondents had no authority or power with respect to television broadcasts and reception (R. 33a, 34a), and rejected the petitioners' contentions.

After the appeal was taken to the Supreme Court of Pennsylvania and just prior to argument, the United States District Court for Eastern District of Pennsylvania in the matter of Allen B. Dumont Laboratories, Inc., et al. vs. Carrol, et al., 86 F. Supp. 813 (Oct. 26, 1949; appeal pending in the United States Circuit Court of Appeals, No. 10, 136), invalidated a regulation of the Pennsylvania State Board of Censors which requires that all motion pictures films intended to be broadcast by television be submitted to the board for approval, on the ground that the power of Congress over television was plenary, so as to exclude any form of State regulation. The authority of the said

decision was urged upon the Supreme Court of Pennsylvania as controlling, but the said contention was rejected. In the Petition for Reargument in paragraphs 4c and 5 (R. 65, 66, 67, 68), the aforesaid federal question was at large again urged, and the decision of the United States District Court in Allen D. Dumont Laboratories et al v. Carrol et al, supra, indicated as controlling and the petitioners sought to have reargued the following federal question:

> "Whether under the Communications Act of 1934, there had been a plenary exercise by Congress over television broadcasting and reception, so as to preclude, prevent and prohibit any exercise by the Pennsylvania Liquor Control Board of television broadcasts or the reception thereof or the licensing thereof in any manner of owners of television receiving sets, who may be holders of liquor licenses issued by the said board contrary to the said Act and Section 8, Clause 3, Article I of the Constitution of the United States."

The petition for reargument was dismissed.

QUESTIONS PRESENTED.

1. Has Congress under the Federal Communications Act fully occupied the field of television broadcasting and reception so as to preclude and prohibit a state from regulating or supervising, in any manner, television reception or the licensing thereof.

2. Is a state license fee imposed for the regulation and supervision of television reception by a state board in restaurants licensed for the sale of alcoholic beverages under

a state liquor control law, violative of section one of the Fourteenth Amendment to the Constitution of the United States, in the light of the federal control of television broadcasting and reception, and where the state board does not have the power to regulate or supervise such reception, has not or had occasion to perform any act of supervision, expended no monies toward that end, can fulfill no function in the public interest by inspection of such reception, and further, where the license fees requisite for such reception would exceed annually the total expenditures of the board for all licensing purposes under its jurisdiction, and for the enforcement of the liquor laws both as respects licensees and the public in general.

STATUTES INVOLVED.

The pertinent constitutional and statutory provisions and regulations are printed in Appendices A, B, C and D, infra. pp. 21 to 32 inclusive.

STATEMENT.

This case was heard and determined upon a Bill in Equity filed by the petitioners in the Court of Common Pleas for the County of Dauphin, Pennsylvania, on the 11th day of February 1949 (R. 2a-3a) and, an Answer raising Preliminary Objections filed by the respondents on March 1, 1949 (R. 23a-31a). Under the applicable procedure the facts averred in the bill "must be taken to be true." (Opinion R. 38a, and opinion R. 57.)

The Pennsylvania Liquor Control Act in Section 602 (14)[5] prohibits licensees from permitting in their establishments "* * * dancing, theatricals or floor shows of any sort or moving pictures exhibitions other than such as are exhibited through machines operated by patrons by deposit of coins * * * unless the licensee shall first have obtained * * *" from the respondents an amusement permit the annual fee for which is fixed by the Act at one-fifth of the liquor license fee which is graduated on a population basis. The same statutory provision makes it unlawful for any licensee to permit "* * * any lewd, immoral or improper entertainment."

On the third day of March 1947, the respondents promulgated a regulation (R. 4a, 5a; and appendix C p. 22) in which it was declared that television devices came within the meaning of the term "moving picture exhibitions" as used in the above section of the Act, and required holders of liquor licenses to secure the amusement permit as the prerequisite to the use of television devices in their establishments and that they pay the requisite fee.

In November 1948, the Supreme Court of Pennsylvania categorically[6] stated and defined the legislative intention of the above quoted statutory provision with respect to television reception to be as follows:

> "* * * we have no hesitancy in holding that what the legislature intended by paragraph (14) of Sec. 602 of the Liquor Control Act was to place under the Board's *supervision* and *regulation* entertainment of certain general types in licensed establishments and *that reproduction upon a screen of images or objects in action constitutes such subject entertainment regard-*

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[5] Paragraph (14) of Section 602 of the Pennsylvania Liquor Control Act of November 29, 1933, P. L. 15 (Spec. Sess. 1933-1934) as amended (47 Purdons Digest No. 744-602) printed as appendix B, infra. p. 21.

[6] Philadelphia Retail Liquor Dealer Association vs. Pennsylvania Liquor Control Board, 360 Pa. 269, in which the court dismissed the contention that as matter of construction the term moving picture exhibition(s)" did not include television reception.

less of whether the scenes are produced by means of television or film projectors. In opposition to this conclusion, the appellants erroneously stress the technical differences in the means of reproducing images on the screen and ignore the really determinative factor, viz., the character of the entertainment. The learned court below correctly apprehended the true test when it said that 'In our opinion, the stress must be placed upon what the observers in the licensed places see, rather than how the thing seen is produced.' *The intent of the Statutory provision is regulation by the Liquor Control Board of screen exhibitions of action pictures in licensed establishments, and the terms employed by the Act in such connection are sufficiently general as to embrace pictures produced by means of television.*"[7]

In the light of the foregoing declaration of legislative intention as respects television, the petitioners in February of 1949, instituted their action challenging the application of the regulation and statute solely upon constitutional grounds. The factual allegations taken to be true in these proceedings, to support this challenge are as follows:

The petitioners conduct restaurants in the City of Philadelphia, and hold restaurant liquor licenses issued by the respondents,[8] for which they pay an annual fee of $600.00 (R. 3a, par. 3 and R. 10a, par. 27). The petitioners, since 1947, have maintained in their restaurants television devices only and have not permitted therein other forms of entertainment (R. 5a, par. 8, and R. 6a, par. 9). There are available to the petitioners only the television programs which are broadcast from stations licensed by the Federal

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[7] Cited with approval in the opinion of the Supreme Court of Pennsylvania in the case at bar. (R. 56).

[8] The respondents constitute an independent administrative board of the Commonwealth of Pennsylvania charged with conducting the states monopoly operated through a "state store" system, the issuance of various types of licenses, and the enforcement of the Pennsylvania Liquor Control Act, 1933, Sp. Sess.; Nov. 29, P. L. 13 No. 1; 47 Purdons Digest 744-901.

Communications Commission under the Communications Act of 1934 (R. 7a, par. 16). Television broadcasts are regulated and supervised in the public interest by the Federal Communications Commission (R. 6a, par. 12) and are made for distribution to the public in general without limitation, particularly for reception in households (R. 6a, par. 13). The petitioners have no contractual relationship with the broadcasters or any control over the subject matter of the television broadcasts (R. 8a, par. 18 and 19). The specific subjects of television broadcasts are set forth from which it may be fairly inferred that they are all of an innocuous nature (R. 7a, par. 14).

All televised motion pictures are approved for exhibition by the appropriate state agency,[9] and otherwise meet the standards and requirements of the Communications Commission (R. 8a, par. 21). The interstate character of television broadcasts is grounded in the allegations describing the phenomenon of television broadcasts (R. 6a, par. 10), and in the allegation that a portion of the programs originate in and the primary broadcasting devices are located in other states (R. 8a, par. 17). The respondents have no power or authority to regulate or supervise in any manner television broadcasts or the reception thereof (R. 8a, par. 22).

Since the promulgation of the regulation, the respondents have neither performed or had occasion to perform any act or to expend any sum whatsoever for the purpose of regulating or supervising television broadcasts (R. 9a, par. 23), and that they cannot perform any function in the public interest by any inspection thereof (R. 9a, par. 24). That by further regulation of the respondents, the counties of Philadelphia, Delaware, and Bucks, in the State of Pennsylvania, constitute licensing and enforcement District No. 1, in which district all of the Petitioners are situated and

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[9] The regulation of the Pennsylvania State Board of Censors respecting televised moving pictures was invalidated while this matter was pending on appeal: Allen B. Dumont Laborstories, Inc., et al. v. Carrol, et al., 86 F. Supp. 813.

their respective television reception apparatus are set up (R. 11a, par. 29 and 30), and that in the said District, all conceivable inspection of television reception may be accomplished, achieved and consummated in every aspect in the offices of the respondents in said District in the City of Philadelphia by an expenditure not exceeding the sum of $900.00 (R. 10a, par. 26). The payment of the annual amusement permit fee of $120.00 per annum by each of the petitioners and others similarly situated in licensing within enforcement District No. 1, would yield annually the sum of $300,000.00 which amount exceeds by $100,000.00 the sum expended or that could be expended by the respondents in the said district for the discharge of all licensing purposes and for the enforcement of all the liquor laws both as respects the general public and persons licensed by the respondents (R. 12a, par. 33, 34, 35), and that as respects the entire Commonwealth of Pennsylvania, that the payment of the required annual amusement permit fees for the privilege of television reception in restaurants licensed by the respondents would yield a sum in excess of $1,370,000.00, which sum is the approximate amount annually expended by the respondents for all licensing purposes and for the enforcement of all liquor laws both as respects the general public and licensees over which the respondents have jurisdiction (R. 13a, par. 36 and 37), and that the per capital cost of the issuance of the amusement permit by the respondents and the performance by them of every necessary or probable supervision of television broadcast in any licensed establishment will not as respects the petitioners or any licensee in the Commonwealth of Pennsylvania exceed a sum purely nominal in amount. The confiscatory character of the amusement permit fee was thus alleged.

The petitioners not having paid any of the permit fees sought in this action to restrain the collection of the $120.00 amusement permit fee applicable to them for each of the licensed years 1947, 1948 and 1949 and for an order invalidating, the regulation making applicable the statutory pro-

vision to television. The petitioners' bill was dismissed and a final decree entered sustaining the constitutionality of the statute and the regulation (R. 51a). This decree was affirmed by the Supreme Court of Pennsylvania, the highest appellate tribunal of the Commonwealth (R. 61). A petition for reargument was filed and dismissed (R. 62 and 70). Pending argument in the Supreme Court, the decision was rendered in Allen B. Dumont Laboratories, Inc. et al. vs. Carrol et al., U. S. District Court, E. D. Pennsylvania, 86 F. Supp. 813.

While the matter was pending in the court of Common Pleas for the County of Dauphin, the General Assembly of Pennsylvania, by amending the Control Act,[10] exempt television reception from the requirements of the amusement permit and the payment of the fee. By apparent oversight, the identical statutory provision[11] which provides for the amusement permit as respects eating places licensed to sell malt beverages was not amended. This litigation accordingly involves the liability of holders of restaurant licenses for a period of three years, and the past and continuing liability of eating place licenses.

On the 20th day of June 1950, the Supreme Court of Pennsylvania entered an Order staying the respondents from proceeding in any manner for the collection of the amusement permit fees until final action by the Supreme Court of the United States on the Petition for Certiorari.

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[10] Paragraph 14 of Section 602 of the Pennsylvania Liquor Control Act of November 29, 1933, P. L. 15, as amended 1949, May 2, P. L. 896 No. 1 (47 Purdons Digest, 744-602 No. 14 PK. PT.).

[11] Paragraph XII of the Beverage License Law, 1933, May 3, P. L. 252 No. 1; 1933 Sp. Sess. Dec. 20, P. L. 75 No. 14 No. 1, as amended (47 Purdons Digest 100f-XII).

REASONS FOR GRANTING THE WRIT.

1. The case involves a new and not previously considered federal question of paramount importance, implicit in the contention that the scheme of federal regulation established by the Communications Act is so pervasive and comprehensive as respects television broadcasting and reception as to render nugatory and preclude the licensing and regulation of television by the respondents. It is respectfully submitted upon the authority of, and reason stated in Cloverleaf Co. v. Patterson, 315 U. S. 148, 151, that the foregoing reason in itself constitutes adequate ground for the review of the decision of the state court.

2. It is of public importance and interest that a decision which sanctions the exercise of state regulation of, and licensing of television reception, shall be reviewed by the Supreme Court of the United States. The decision of the Supreme Court of Pennsylvania runs violently counter to the declared policy of Congress with respect to television, and the decisions of the Supreme Court of the United States defining this policy.

The complete Congressional occupation of the field by virtue of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U. S. C. #151, et seq.; 1946 and Supp. III), is implicit in the Act itself and in the opinions of the Supreme Court in Federal Communications Commission v. Pottsville Broadcasting Co. 309 U. S. 134, and National Broadcasting Co. v. United States, 319 U. S. 190. Federal Control extends by the very terms of the Act to reception which is the subject of the State regulation. Section 3(b) of the Act 47 U. S. C. #153 (b) provides:

"'Radio communications' or 'communication by radio'

means the transmission by radio of writing, signs, pictures, and sounds of all kinds, including *all instrumentalities, facilities, apparatus,* and services (among other things, the *receipt forwarding and delivery* of communications) incidental to such transmission" (Emphasis supplied).

The Supreme Court of Pennsylvania in the current case[12] and in the previous case on this subject,[13] emphasized that,

> "The intent of the statutory provision[14] is *regulation* by the Liquor Board *of screen exhibitions of action pictures* in licensed establishments and the terms employed by the Act in such connection are sufficiently general as to embrace pictures produced *by means of television*" (Emphasis supplied).

The intent as so defined impinges directly upon the policy of the Communications Act of 1934, and the powers vested in the Communications Commission: Section 326 of the Act, 47 U. S. C. #326 (1946, Supp. III; National Broadcasting Co. v. United States, 319, U. S., 215-216.[15]

The limits of the exercise of the police power of the Commonwealth of Pennsylvania as respects television was directly considered in Allen B. Dumont Laboratories, Inc. v. Carroll, et al. (86 F. Supp. 813 (1949)), where Kirpatrick Ch. J. considered the following question:

> "Did Congress, in enacting the Radio Act of 1927 * * * and the Communications Act of 1934, intend to occupy the entire field of communication by radio and television and to exclude the power of the states to regulate every phase of it, including censorship?" (p. 815)

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[12] Cavanaugh, et al. v. Gelder, et al., 364 Pa. 361; R. 56.

[13] Philadelphia Retail Liquor Dealers Association vs. Pennsylvania Liquor Control Board, 360 Pa. 269, 272.

[14] Section 602 (14) of the Control Act, infra. p. 21.

[15] "* * * It puts upon the Commission the burden of determining the composition of that traffic."

It was held, that there had been

> "a plenary exercise by Congress of the power to regulate and a complete occupation of the field * * *" (p. 815).

The Supreme Court of Pennsylvania has made it clear in construing the legislative intent of Section 602 (14) of the Control Act, that the Statute vested in the respondents the very same regulatory powers and extending to the precise subject which was stricken down by Kirpatrick Ch. J.:

> "The learned court below found and it is not disputed that television is used to broadcast moving picture exhibitions. In that connection, an expert witness called by the plaintiff admitted that when a motion picture is shown on a televised set, the same picture there appears as would be seen on a screen where the televised picture is being broadcast. In that situation, such entertainment could not fairly be characterized as other than a moving picture exhibition, and therefore, directly subject to the Board's regulation and control by the express words of the Act * * * The capacity of the television device, when in operation, for the rendition of 'moving picture exhibitions' well satisfies the Board's requirement of an Amusement Permit for the exhibition of televised entertainment in licensed establishments." (Phila. Ret. Liq. Dealers v. Pa. Liq. Bd., 360 Pa. 269, 274, 275.) (How the regulation and control referred to could be exercised, is the mystery of this litigation.)

It is quickly apparent that the decision of the Supreme Court of Pennsylvania in the case at bar, is in direct conflict with the decision of the federal courts. Where Congressional action has "occupied the field," the police powers of the state cannot be exercised. Railroad Company v. Husen, 95 U. S. 465, 471 (1877); Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 (1942); Hines v. Davidowitz, 312

U. S. 52, 74 (1941). There is accordingly urgency in a review by and a determination of the question by the Supreme Court of the United States.

3. The decision of the Supreme Court of Pennsylvania is contrary to and violates the principle of due process under Section One of the Fourteenth Amendment as clearly defined by the Supreme Court of the United States in applicable decisions. It is important that the holding of the Supreme Court of Pennsylvania, upon this constitutional ground be reviewed because it involves not merely the rights of the petitioners, but virtually of hundreds of other persons similarly situated; in the City of Philadelphia alone, the liability of 1807 restaurant liquor licensees is involved. The past and continuing rights of all eating place licensees are also involved.[16]

The decision of the Supreme Court of Pennsylvania on the issue of deprivation, both on the facts and law, is in direct conflict with Postal Telegraph—Cable Co. v. Taylor, 192 U. S. 64 (1904), where the judgment of the Supreme Court of Pennsylvania, sustaining a borough license fee for the inspection and supervision of telegraph poles, was reversed. Pertinent to the facts alleged in the case at bar are the reasons for reversal stated by Mr. Justice Peckham:

> "The borough has in fact done nothing, in the way of inspection or supervision during the time covered by the license in question. It has not expended one dollar for any such purpose. It has incurred no liability to pay any expense arising from the inspection or supervision on its behalf. The fee is twenty times the amount of expense that might have been reasonably and fairly incurred to make the most careful * * * inspection * * * of such poles * * *" (p. 70).

Petitioners' position is fully supported by the decision in Great Northern Railway Co. v. Washington, 300 U. S. 154

[16] Supra, p. 12 footnote 11.

(1937). The holding of this case that the imposition of a license fee exceeding the reasonable cost of supervision or regulation, violates the Fourteenth Amendment is particularly in point for a critical comparison of the facts in the reported case and those present in the record at bar, show the presence of a scheme markedly more confiscatory as regards the petitioners than was present in Great Northern Railway Co. v. Washington (supra), in that the record here admits that no supervision or regulation of any kind has been performed and that the subject of the regulation is intrinsically and constitutionally beyond the powers of the respondents, and that the collection of the fees would concededly yield more than is necessary to defray every expense of the enforcement of the liquor laws of the Commonwealth incurred by the respondents as respects all licensees and the public in general. The limits of exproportion in Great Northern Railway Co. v. Washington (supra) never approached this magnitude, and if, therefore, under that case minimal exaction was deemed by this Court, to be destructive of the scheme involved, it would appear to the petitioners that the same result must follow here. The facts of deprivation in this case are unique, in that the records disclose that there is absolutely no necessity for the exercise of the state's police power, and a total absence of regulation, supervision or inspection, or any expenditures towards these ends.[17]

It is submitted with absolute deference that the grounds stated by the Supreme Court of Pennsylvania to sustain the deprivation are demonstrable as totally untenable, even within the limits of this petition:

(a) The intention of subsection 14 of Section 602 of the Control Act is merely the regulation of the entertainment

[17] 6. The Pennsylvania law clearly recognizes the rule that "* * * a fee for (a) license * * * must be such a fee only as will legitimately assist in the regulation and it should not exceed the necessary or probable expense of issuing the license and of inspection and regulating the business which it covers": Flynn v. Horst, 356 Pa. 20, 28, wherein, the license fee was declared in violation of Section One of the Fourteenth Amendment.

in accordance with the standards set forth in the Section, and it manifests no intention whatsoever toward restraining the liquor traffic. In addition to what the Supreme Court has twice stated to be the intent of the statute, namely "regulation * * * of screen exhibitions," which includes television, it is to be observed that the contention that regulation of the entertainment is the sole object of the legislation is fully fortified when it is noted that only those forms of entertainment which require regulation are the subject of the permit. Club licensees are expressly exempt,[18] upon the obvious theory that in private clubs the entertainment proprieties will be observed. Music, no matter how elaborately rendered, radio, moving pictures shown from coin operated devices by the public,[19] are and, now, television[20] itself, has been made exempt. Clearly, if the intent of the statute was to go beyond the regulation of entertainment which required censorship pursuant to the statutory standard, no class of license would be exempt, and all forms of entertainment included. An annual amusement permit fee which can be as low as $25.00 annually, shows no intention of restraining the sale of liquor. A id the annual fee in the sum of $120.00, when paid for the supervision of theatricals, floor shows and dancing, shows no intention other than the payment of the cost of supervision for these forms of entertainment. It obviously has no leverage for the purpose of restraining the sale of liquor. The fee is infinitesimal compared to the annual cost of providing such entertainment.

(b) The rule which permitted the collection of a liquor license fee in excess of the cost of regulation had applica-

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[18] Paragraph 14, Section 602 of the Control Act, Appendix B, infra. p. 21.

[19] Paragraph 14, Section 602 of the Control Act, Appendix B, infra. p. 21.

[20] Act of May 2, P. L. 896 No. 1 (47 Purdons Digest 744-604 (14) PK. PT., 1950).

tion to saloons in the period when the control of the liquor business was in private hands. Pennsylvania imposed a "high license" fee for the reason adequately stated in Raudenbusch's Petition, 120 Pa. 328, 340, 341:

> "One was to increase the price of the license by which many saloons would be closed and the others rendered more respectable * * *."

The Pennsylvania Liquor Control Act was, however, adopted to "prohibit forever the open saloon,"[21] and the respondents constitute the "governmental agency by means of which the state has entered upon and controls the business of selling liquor": Popper v. Pennsylvania Liquor Control Board, 16 F. Supp. 762 (1936). That the subject of the "high license" fee no longer exists in Pennsylvania was judicially noted by the Supreme Court of Pennsylvania in Puntureri v. School District of Pittsburgh, 359 Pa. 596 (1948), where the court stated:

> "He (plaintiff) relies largely upon the decision in Commonwealth v. Iron City Brewing Co., 146 Pa. 642, 23A, 384. That case held that the effect of the liquor license Act of May 13, 1887, P. L. 108, May 24, 1887, P. L. 194, and June 9, 1891, P. L. 257, which established the so-called 'high license' system, was to make inapplicable to dealers in intoxicating liquors the then existing mercantile license tax * * * It may be added that we are not dealing here, as in the Iron City Brewing Company case with saloons of the type which then existed, but *with restaurants which* enjoy *liquor licenses only in connection and presumably incidental to the sale of food to their patrons*" (p. 600) (Emphasis supplied).

The very subject of the unrestricted liquor license fee, upon which is predicated the entire decision of the Supreme Court of Pennsylvania no longer exists in that Commonwealth.

---

[21] Pennsylvania Liquor Control Act of November 29, 1933, P. L. 15, Art. I. No. 13; 47 Purdons Digest 744-3(a).

The fee for the licenses ranging from $150.00 to the maximum of $600.00 show no legislative intention for the utilization of the license fee as a method of restraint.

(c) The minor premise of the decision rests entirely upon the declared presumption of the court (R. 60) as to the purpose of maintaining television devices in the petitioners' restaurants. A presumption by the Court cannot be the basis for sustaining the exercise of the police power. It comes within the class of "fanciful conjecture."[22] The validity of a state's exercise of the police power can be decided only "in the lights of the facts in the case, to determine whether the regulation is reasonable, and valid, or essentially unreasonable, arbitrary and void.[23] Here the facts establish deprivation only.

(d) The position that Section (602) 14, is an exercise of the police power, cannot "justify, disregard of constitutional inhibitions,"[24] for "every state is limited by the inhibitions of the XIV Amendment."[25]

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ABRAHAM J. LEVINSON,
Counsel for Petitioners.

July 1, 1950.

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[22] Bordens Co. v. Baldwin, 293 U. S. 194, 209.

[23]. Norfolk Ry. v. Public Service Com., 265 U. S. 70, 74 (1924).

[24] Panhandle v. Highway Commission, 294 U. S. 613, 619 (1935).

[25] Southern Railway v. Virginia, 290 U. S. 190, 196 (1933).

APPENDIX.

APPENDIX "A."

SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX "B."

PARAGRAPH 14 OF SECTION 602 OF THE PENNSYLVANIA LIQUOR CONTROL ACT (1933, 1934 SP. SESS., NOVEMBER 29, P. L. 15, ART. VI, NO. 602; 1935 JULY 18, P. L. 1246 NO. 1; 1937, JUNE 16, P. L. 1762 NO. 1, (47 PURDON'S DIGEST NO. 744—602—SUBSECTION 14).

"(14) It shall be unlawful for any licensee, except club licensees, to permit, in any licensed premises, or in any place operated in connection therewith, dancing, theatricals, floor shows, or moving picture exhibitions of any sort, unless the licensee shall first have

obtained, from the board, a special permit to provide such entertainment; or for any licensee, under any circumstances, to permit in any licensed premises, any lewd, immoral or improper entertainment; regardless of whether a permit to provide entertainment has been obtained or not. The board shall have power to provide for the issue of such special permits, and to collect a fee for such permits equal to one-fifth of the annual license fee, but not less than twenty-five dollars ($25). All such fees shall be paid into the State Stores Fund. No such permit shall be issued in any municipality which, by ordinance, prohibits amusements in licensed places. Any violation of this clause shall, in addition to the penalty herein provided, subject the licensee to suspension or revocation of his permit and his liquor license."

APPENDIX "C."

REGULATION OF PENNSYLVANIA LIQUOR CONTROL BOARD RESPECTING TELEVISION RECEPTION.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA LIQUOR CONTROL BOARD
Harrisburg, Pennsylvania
March 3, 1947

(Seal)
BULLETIN NO. A-62
SUBJECT: Television
TO: All Retail Licensees
(Except Clubs)

It has been brought to the attention of this Board that television devices are being distributed throughout the state

and in some instances have been placed in retail licensed establishments.

This type of device or entertainment has been construed as being within the general classification of moving picture exhibitions. Section 602, subsection 14 of the Pennsylvania Liquor Control Act, and Section 23, subsection XII of the Beverage License Law provide, respectively, that it shall be unlawful for any licensee, his servants, agents, or employes, except clubs, to permit in any licensed premises a moving picture exhibition of any sort, unless the licensee shall have first obtained from the Board a special permit to provide such entertainment. The special permit referred to in both of these statutes is the Amusement Permit issued by application to this Board.

Therefore, all Retail Liquor and Malt Beverage I icensees, except clubs, are hereby officially notified that the use of television devices in their licensed establishments, or in any place operated in connection therewith, is unlawful unless the licensee is a holder of a valid Amusement Permit issued by the Pennsylvania Liquor Control Board.

BY ORDER OF THE PENNSYLVANIA LIQUOR CONTROL BOARD

THOS. D. FRYE
Thos. D. Frye
Secretary

APPENDIX "D."

COMMUNICATIONS ACT OF 1934, AS AMENDED.
(Pertinent portions only)

BEING AN ACT TO PROVIDE FOR THE REGULATION OF INTERSTATE AND FOREIGN COMMUNICATION BY WIRE OR RADIO, AND FOR OTHER PURPOSES.

(As Published by the Federal Communications Commission.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL PROVISIONS

Purpose of Act; Creation of Federal Communications Commission.

Sec. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication,[1] and for the purpose of securing a more effective execution of this policy by centralizing authority hereto-

[1] The provision relating to the promotion of safety of life and property was added by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, approved and effective May 20, 1937, 50 Stat. 189.

fore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

APPLICATION OF ACT

Sec. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Philippine Islands or the Canal Zone, or to wire or radio communication or transmission wholly within the Philippine Islands or the Canal Zone.

DEFINITIONS

Sec. 3. For the purpose of this Act, unless the context otherwise requires ——

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(c) "Licensee" means the holder of a radio station license granted or continued in force under authority of this Act.

(d) "Transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Philippine Islands and the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Philippine Islands or the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not include wire communication between points within the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

(g) "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Philippine Islands or the Canal Zone.

(k) "Radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

(o) "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

TITLE III—PROVISIONS RELATING TO RADIO

Part I—General Provisions[13]

LICENSE FOR RADIO COMMUNICATION OR TRANSMISSION OF ENERGY

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other state, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State of any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception

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[13] This heading was amended to read as above by "An Act to amend the Communications Act of 1934, etc." Public No. 97, 75th Congress, approved and effective May 20, 1937, 50 Stat. 192.

of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

GENERAL POWERS OF COMMISSION

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall ——

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* That changes in the frequencies, author-

ized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the large and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee ——

(A) Has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or * * *

(D) Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted

(1) False or deceptive signals or communications, or

(2) A call signal or letter which has not been assigned by proper authority to the station he is operating; or * * *

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rule and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated. * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

ALLOCATION OF FACILITIES; TERM OF LICENSES

Sec. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the

limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) The Commission shall study the proposal that Congress by statute allocate fixed percentages of radio broadcasting facilities to particular types or kinds of non-profit radio programs or to persons identified with particular types or kinds of non-profit activities, and shall report to Congress, not later than February 1, 1935, its recommendations together with the reasons for the same * * *.

HEARINGS ON APPLICATIONS FOR LICENSES; FORM OF LICENSES; ATTACHED TO LICENSES

Sec. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

REVOCATION OF LICENSES

Sec. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by Section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States * * *.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with: * * *

CENSORSHIP; INDECENT LANGUAGE

Sec. 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

FILED
SEP 8 1950
CHARLES ELMORE CROPLEY
CLERK

No. 172

IN THE

Supreme Court of the United States

October Term, 1950

Patrick Cavanaugh, Thomas L. Maguire, James Bannon, Peter Geraghty, Carl Amann, James Bradley, John Brolly, John J. Byrne, John P. Crane, David Chabrow, Hugh Dougherty, Dennis Dunn, Michael Flood, Daniel J. McCartney, Michael J. McGillin, Emmett McGinn, Michael McGinn, J. Russell Rickenbach, John A. Stretch, Ewald Zielenbach, John O'Donnell, Thomas A. Gallagher, Frederick Riegel, Harry McCloskey, Vincent Dapsis,

Petitioners

v.

Frederick T. Gelder, Charles C. McGovern, and Frank D. Armstrong, constituting and comprising the PENNSYLVANIA LIQUOR CONTROL BOARD,

Respondents

On Petition For A Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENTS IN OPPOSITION

CHARLES J. MARGIOTTI,
Attorney General.
HARRY F. STAMBAUGH,
Special Counsel.
HORACE A. SEGELBAUM,
Deputy Attorney General,
Attorneys for Respondents.

State, Capitol,
Harrisburg, Pennsylvania

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47 Purd. Pa. Stat. Sec. 744-602 (14), Pa. Liquor Control Act of Nov. 29, 1933 1

ACT:

Federal Communications Act of June 19, 1934:

47 U. S. C. A. Sec. 301 4

47 U. S. C. A. Sec. 151 4

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ARGUMENT

The petition for certiorari challenges the decision of the Supreme Court of Pennsylvania holding constitutional subsection 14, of Section 602 of the Pennsylvania Liquor Control Act of November 29, 1933, Pamphlet Laws 15, 47 Purd. Pa. Stat. Sec. 744-602 (14), which provides as follows:

> "(14) It shall be unlawful for any licensees, except club licensees, to permit, in any licensed premises, or in any place operated in connection therewith, dancing, theatricals, floor shows, or moving picture exhibitions of any sort, unless the licensee shall first have obtained, from the board, a special permit to provide such entertainment, or for any licensee, under any circumstances, to permit, in any licensed premises, any lewd, immoral or improper entertainment, regardless of whether a permit to provide entertainment has been obtained or not. The board shall have power to provide for the issue of such special permits, and to collect a fee for such permits equal to one-fifth of the annual li-

cense fee, but not less than twenty-five dollars ($25). All such fees shall be paid into the State Stores Fund. No such permit shall be issued in any municipality which, by ordinance, prohibits amusements in licensed places. Any violation of this clause shall, in addition to the penalty herein provided, subject the licensee to suspension or revocation of his permit and his liquor license."

The words "any licensee" are limited to "a hotel liquor licensee, restaurant liquor licensee, or club liquor licensee", by Section 401 of this statute.

The phrase "moving picture exhibitions of any sort" has been construed to include television programs by the Supreme Court of Pennsylvania in **Philadelphia Retail Liquor Dealers Association v. Pennsylvania Liquor Control Board,** 360 Pa. 269 (1948).

Petitioner contends that this section is unconstitutional because—

(1) Congress, by enacting the Federal Communications Act of June 19, 1934, 47 U. S.C.A. Sec. 301, has completely occupied the field of television broadcasting and reception, so as to supersede the Pennsylvania statute.

(2) The license fee imposed by subsection 14 of the Pennsylvania statute violates the principle of due process of law guaranteed by Section 1 of the Fourteenth Amendment.

Respondents deny both these contentions.

Argument

I.

Congress, by enacting the Federal Communications Act, has not occupied the field of television broadcasting or reception completely or so as to supersede the Pennsylvania statute.

No Act of Congress specifically regulates television. Plaintiffs rely upon the Federal Communications Act of June 19, 1934, 47 U.S.C.A. Sec. 301, which regulates communication by radio.

The Federal Communications Act is only a partial occupation of the field of regulating communication by radio.

The question whether the Act includes television has not been passed upon by this court. However, the Federal Communications Commission for some years has exercised jurisdiction over television and has issued licenses to stations for broadcasting by television.

Section 151, 47 U.S.C.A. Sec. 151, creates the Federal Communications Commission:

> "For the purpose of regulating interstate and foreign commerce in communication by

wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges * * *."

Section 153 (b), 47 U.S.C.A. Sec. 153, defines "Radio communication" as follows:

> "(b) 'Radio communication' or 'communication by radio' means the transmission by radio, of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

The important and relevant provisions covering the powers of the Commission, as contained in Section 303 of the Federal Communications Act, 47 U.S.C.A. Sec. 303, have been summarized by Mr. Justice Frankfurter in **National Broadcasting Co. v. United States,** 319 U. S. 190 (1943), as follows:

> "Section 303 provides:
>
> " 'Except as otherwise provided in this Act, the Commission from time to time, **as**

public convenience, interest, or necessity requires, shall—

"(a) Classify radio stations;

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * * * * * *

"(f) Make such **regulations** not inconsistent with law as it may deem necessary to **prevent interference** between stations and to carry out the provisions of this Act * * *;

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * * * *

"(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * * * *

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act. * * *" (214-215) (Italics ours)

In addition, Section 309 (a) provides:

> "(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall **determine that public interest, convenience, or necessity would be served** by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. * * *" (Italics ours)

As was said by Mr. Justice Frankfurter in **National Broadcasting Company v. United States,** 319 U. S. 190 (1943),

> "The criterion governing the exercise of the Commission's licensing power is the 'public interest, convenience or necessity.' * * *" (215)
>
> * * * * * * *
>
> "* * * Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of 'public interest, convenience or necessity.' See Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U. S. 134, 138 n. 2." (217).

The Federal Communications Act contains no declaration by Congress that the Act is intended

to supersede State legislation, and particularly State legislation under the police power to regulate the sale of intoxicating liquors.

The Federal Communications Act does not express any intention to supersede the provisions of the Pennsylvania statute that (a) the holder of a license to sell intoxicating liquors in a hotel or restaurant must pay an additional license fee for the privilege of conducting dancing, theatricals, floor shows, or moving picture exhibitions of any sort; or (b) that such holder or licensee may not permit any lewd, immoral or improper entertainment on the licensed premises.

Subsection 14 does not conflict with a single provision of the Federal Communication Act. Counsel for petitioners have not cited any provision of the Act or any regulation or ruling of the Commission which is in conflict.

It does not pretend to say who may broadcast from a television station or what may be so broadcast.

Section 14 does not authorize the Pennsylvania Liquor Control Board to censor programs or exercise any control over a television broadcasting station. It is noteworthy that Section 326, 47 U.S.C.A. Sec. 326 of the Federal Communications Act also provides:

> "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station * * *."

Subsection 14 does not have the slightest effect upon anything that the commission does.

The Federal Communications Act and the commission are concerned with **Broadcasting,** not **receiving,** by television.

The purpose of the Act is to regulate wave lengths and other conditions and activities, with a view to increasing and improving broadcasting. The Act has nothing to do with the owner of a receiving set. It does not intend to regulate in any manner what use the owner may make of his set. It does not deal with the tax which he pays on his set any more than it deals with the price which he pays for his set.

The regulation of the owner of a receiving set is a field which Congress has not attempted to occupy at all.

In **Ziffrin, Inc. v. Reeves,** 308 U. S. 132 (1939), this court held that the provision of a Kentucky statute that intoxicants might be transported only by persons holding a license from the State, was not in conflict with or superseded by the

Federal Motor Carrier Act of 1935 or a certificate of such convenience or necessity issued under it, authorizing the appellant to operate as a contract carrier.

In the opinion, this court said:

> "The Motor Carrier Act of 1935 is said to secure to appellant the right claimed, but we can find nothing there which undertakes to destroy state power to protect her people against the evils of intoxicants or to sanction the receipt and conveyance of articles declared contraband. The Act has no such purpose or effect." (140)

The Pennsylvania Liquor Control Act has been construed and held by the Supreme Court of Pennsylvania to be a valid exercise of police power to regulate and restrain the sale of intoxicating liquors.

This was held in **Commonwealth v. Stofchek,** 322 Pa. 513 (1936), in which Chief Justice Kephart said:

> "The Liquor Control Act is stated by the legislature to be '. . . an exercise of the police power of the Commonwealth for the protection of the public welfare, health, peace and morals of the people of the Commonwealth, and to prohibit forever the open saloon; . . .'

While that body may so express its object, the courts will examine the act to determine whether there is a real relation of the subject-matter to that purpose. As thus examined its provisions are in entire accord with the police power of the State as it has been defined by our decisions. * * *'' (520-521)

II.

The police laws of a State are superseded by an Act of Congress only where the conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.

It was so held in—

Kelley v. Washington, 302 U. S. 1, 9-10;

Missouri, Kansas and Texas Railway Company v. Harris, 234 U. S. 412, 418-419;

Maurer v. Hamilton, 309 U. S. 598, 614;

Southern Pacific Co. v. Arizona, 325 U. S. 761, 766;

Allen-Bradley Local v. Board, 315 U. S. 740, 749;

Welch Co. v. New Hampshire, 306 U. S. 79, 84-85.

In **Kelley v. Washington**, 302 U. S. 1 (1937), Chief Justice Hughes said:

> "* * * Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle

is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " (9-10) (Boldface ours)

In **Missouri, Kansas & Texas Railway Co. v. Harris,** 234 U. S. 412 (1914), Mr. Justice Pitney said:

"These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, **unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject.** 'This court has said—and the principle has been often reaffirmed—that "In the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, **the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.**" Sinnot v. Davenport, 22 How. 227, 243' * * *" (418-419) (Boldface ours)

In **Cloverleaf Co. v. Patterson,** 315 U. S. 148 (1942), Mr. Justice Reed said:

> **"When the prohibition of state action is not specific but inferable from the scope and purpose of the federal legislation, it must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation."** (155-156) (Boldface ours)

III

The power of the State to prohibit the sale of intoxicating liquors includes the power to limit or regulate the use of means or devices intended to encourage and increase the purchase and consumption of such liquors.

Petitioner contends (pp. 16-19) that the amount of the license fee of $120 exceeds the cost of administering and enforcing the statute.

However, the cost of administration or supervision is irrelevant where, as in this case, the state is enacted under the police power to regulate and control the sale of intoxicating liquors, or under the power to raise revenue.

This was squarely ruled in **Ziffrin, Inc. v. Reeves,** 308 U. S. 132 (1939), in which Mr. Justice McReynolds said:

> "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power in-

cludes the less. Seaboard Air Line Ry. v. North Carolina, supra [245 U. S. 298, 304]. The State may protect her people against evil incident to intoxicants, Mugler v. Kansas, 123 U. S. 623; Kidd v. Pearson, 128 U. S. 1; and may exercise large discretion as to means employed.

"Kentucky has seen fit to permit manufacture of whiskey only upon condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are not unreasonable and are clearly appropriate for effectuating the **policy of limiting traffic in order to minimize well-known evils, and secure payment of revenue.** * * *" (138-139) (Boldface ours)

As was stated by this court in the Ziffrin case, the State may exact a fee for a license to sell liquor as a means of raising **revenue.**

If the license fee produced only enough money to defray the cost of enforcement, the statute would not be a **revenue** measure at all because it would not produce anything over and above the cost of enforcement.

The license fee is also a restraint under the police power upon the use of the device of television as a method of entertainment and of at-

tracting persons to frequent a liquor-selling restaurant and to purchase and consume intoxicating liquors.

In order to minimize the evil, the Commonwealth of Pennsylvania may limit the use of television, just as the State of Kentucky was allowed to limit the use of trucks to transport—even in interstate commerce—intoxicating liquors to places where persons might buy and drink the same. In each case the activity restrained by the license would tend to increase the purchase and consumption of intoxicating liquor.

In construing the statute in controversy, the Supreme Court of Pennsylvania, in its opinion in this case, quoted the following passage from the opinion of the court of common pleas (R. 60):

> "* * * Admittedly, plaintiffs exhibit televised entertainment in their licensed establishments, presumably for the purpose of attracting and holding patrons and thereby increasing sales. The legislature had the power to absolutely forbid, or to grant under specified conditions, licenses for the sale of intoxicating liquors. It had the power to absolutely forbid, or to permit under specified conditions, entertainment in licensed establishments. It had the power to fix

the amount of the liquor license fees in municipalities according to population. Likewise, it had the power to fix the amount of the amusement permit fee in licensed establishments at one-fifth of the liquor license fee. In view of the foregoing and since the Liquor Control Act was enacted to restrain and not to promote traffic in liquor, it necessarily follows that both Section 602(14) supra, and the regulation, Bulletin A-62, issued by the Board pursuant thereto, have a reasonable relationship to the end to be attained in regulating traffic in intoxicating liquors, and as such are a legitimate and proper exercise of the police power reserved to the state and, further, do not contravene any of plaintiffs' other constitutional rights."

IV.

The petition for certiorari should be denied.

We submit that the decision of the Supreme Court of Pennsylvania is correct. No conflict of decisions is involved and the question in the case is clearly settled by decisions of this court.

Respectfully submitted,

CHARLES J. MARGIOTTI,
Attorney General.

HARRY F. STAMBAUGH,
Special Counsel.

HORACE A. SEGELBAUM,
Deputy Attorney General.
Attorneys for Respondents.

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ARGUMENT.

I.

THE COURT OF APPEALS HAS AFFIRMED DUMMONT LABORATORIES, INC. V. CARROLL.

The United States Court of Appeals for the Third Circuit on September 5, 1950 affirmed the judgment of the District Court in the case of Allen B. Dummont Laboratories, Inc. v. Carroll, et al. (86 F. Supp. 813), which was referred to in the Petition. The affirmance brings into sharp relief the conflict between the state court and the federal courts upon the important questions of federal law presented in the Petition for Writ of Certiorari.

The opinion by Chief Judge Biggs has not yet been reported and is printed herein as Appendix "A". It affirms the propositions that "television broadcasting is in interstate commerce"; that "the Communications Act of 1934 applies to every phase of television"; "that Congress has occupied the field of television regulation and that the field is no longer open to the States." Respondents' contentions upon these issues (Respondents' Brief, pp. 4-9) are therefore without merit.

Respondents' contention that the regulation of television reception is not encompassed by the Communications Act (Respondents' Brief, p. 9) by-passes the realities of electrical communications, for the reception apparatus, is an integral and essential instrument of such communications. The phenomenon of television communications is rendered non-existent by the absence of the reception apparatus (R. 19, 20, 21). Respondents' contention ignores the Congressional definition which expressly includes such ap-

paratus as a part of radio communications (47 U. S. C. #153 (b); Petition, p. 13).

II.

ZIFFRIN V. REEVES IS NOT APPLICABLE.

Ziffrin, Inc. v. Reeves, 308 U. S. 132, cited by the respondents (pp. 9 and 15), is not applicable either in principle or to the facts of this matter. The subject matter of state regulation in that case was intoxicants and the transportation thereof. With respect to this subject matter, the power of the states is derived from the Twenty-first Amendment of the Constitution of the United States, and the Constitutional policy is local and not national regulation. The subject matter of regulation in the case at bar is not intoxicants, but television, a form of radio communications which is subject to regulation solely under the Commerce Clause of the Constitution, and with respect to which Congressional regulation is absolutely exclusive. The states cannot exercise any police power with respect to this subject. The supposition that the licensing of television will aid in the control of liquor dispensation in Pennsylvania, cannot create any power in the State, when Congress in the clearest manner has manifest its purpose to exercise its exclusive power over television communications. As is indicated in the Petition, the supposed relationship between television exhibitions and sales of intoxicants is a matter of pure conjecture (Petition, p. 20). The Supreme Court of Pennsylvania has moreover twice stated that the intent of subsection 14, Section 602 of the Pennsylvania Liquor Control Board is the "regulation * * * in licensed establishments of pictures * * * produced by television" (R. 56, Petition p. 14). This can mean only that the

Supreme Court of Pennsylvania construes the law to mean that the Respondents may regulate television programs in licensed establishments. This encroaches directly upon the exclusive domain of the Communications Commission for "The Communications Act of 1934 applies to every phase of television" and "program control was entrusted to the federal commission. * * *" (Biggs, Ch. J., in Allen B. Dumont Laboratories, Inc. et al below, Appendix, pages 5 to 10, inc.)

The Respondents, for the purpose of utilizing Ziffrin, Inc. v. Reeves, supra, as authority for the position that the amusement permit fee is not confiscatory, make the argument inferentially, that the purpose of the amusement fee is to raise revenue (Respondents' Brief, p. 16). The Pennsylvania courts in this litigation have made clear that the licensing here was not "an exercise of the taxing power of the State to raise revenue." (Opinion, R. 58.)

It should be noted that the fees for liquor licenses are not retained by the Respondent Board for purposes of state revenue, but, pursuant to statutory direction, are paid over by the Board "to the respective municipalities and townships in which the respective licensed places are situated" (1933, Sp. Sess.; Nov. 29, P. L. 15, Art. VII, #701, 1935, July 18, P. L. 1246 #1, 1937, June 16, P. L. 1762, # ; 47 Purdons Digest 744-701). This is intended to cover the cost of local police control. The amusement permit fee which is the subject of this litigation is by the express terms of subsection 14 of Section 602 "paid into the State Store Fund", into which various filing fees, wholesaler's license fees, penalties and the profits of the State Store System are paid, and from which the expenditures of the Board incurred for licensing and enforcement referred to in the Bill in Equity are paid. (1933 Sp. Sess., Nov. 29, P. L. 15, Art. VII, #702, 1935, July 18, P. L. 1246 #1; 1937, June 16, P. L. 1762 #1; 47 Purdons Digest 744-702.)

The Respondents do not deny the facts of confiscation, nor do they deny the applicability of the decisions in Postal Telegraph Cable Co. v. Taylor, 192 U. S. 64; in Great Northern Railway Co. v. Washington, 300 U. S. 154, referred to in the Petition (p. 16).

III.

CONCLUSION.

It is respectfully submitted that the reasons given in the Petition for the granting of the Writ of Certiorari have in no manner been impaired by Respondents' contentions. The Petition presents not only a direct conflict of authority in a new, but increasingly important field of federal regulation, but a grave violation of constitutional protection affecting numerous persons, contrary to the decisions of this Court.

Respectfully submitted,

ABRAHAM J. LEVINSON,
Counsel for Petitioner.

APPENDIX A.

OPINION.

ALLEN B. DUMMONT LABORATORIES, INC., ET AL.,
vs.
CARROLL, ET AL.

(No. 10136 in the United States Court of Appeals for the Third Circuit.)

OPINION BY CHIEF JUDGE BIGGS, SEPTEMBER 5, 1950.

(Reported, Philadelphia Legal Intelligencer, September 7, 1950.)

The suit at bar was brought under the Federal Declaratory Judgments Act, now 28 U. S. C. §§2201-02, to determine whether the Commonwealth of Pennsylvania, pursuant to a regulation promulgated by the State Board of Censors under the Act of May 15, 1915, P. L. 534, as amended, 4 PS §§41-58, may censor films used by the plaintiffs in projecting television programs in the State of Pennsylvania. The court below found among other things, 86 F. Supp. 813, that the regulation promulgated by the Board of Censors conflicted with Federal authority in a field fully occupied by Congress when it enacted the Radio Act of 1927, 44 Stat. at L. 1162, and the Communications Act of 1934, 47 U. S. C. Supp. §§151 et seq., and found the regu-

lation invalid. The members of the Board of Censors have appealed.

The television programs broadcast by the plaintiffs are received by persons possessing television sets not only within the borders of the Commonwealth of Pennsylvania but also, depending upon the location and power of the broadcasting station, in Delaware, Maryland, New Jersey, West Virginia, Ohio and New York. As was found by the court below, "There is no way by which the television broadcasts of the plaintiffs can possibly be confined so as to be received exclusively by receiving sets within Pennsylvania". The record also demonstrates that some of the plaintiffs' programs are delivered by wire or radio relay from television stations located outside of Pennsylvania. There is no doubt but that television broadcasting is in interstate commerce. This is inherent in its very nature.

We think it unnecessary to describe in any great detail the technical methods whereby films are made or procured and employed by the television industry. "Live" programs consist of the broadcast of pictures of living persons actually before the camera at the time of transmission. But film may be integrated into an otherwise live program to furnish sound, action or background. By the process known as "kinescope recording" or "tele-transcription" live programs may be and frequently are recorded on film at the time of their production to the end that the film can be used for broadcasts of the programs. By "bicycling" the same print may be used successively at different broadcasting stations distant from each other. Of the films used for television broadcasting by the plaintiff stations only a small part are made or originate within Pennsylvania. The record also demonstrates that of all the broadcasting conducted by the television stations of the United States at least 25 percent consists of the projecting of films. The

percentage of films used in the industry is growing constantly.

We agree with the court below that the Communications Act of 1934 covers the television, as well as the radio field. 47 U. S. C. §152(a), provides: "The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States in such communication or such transmission of energy by radio and to the licensing and regulating of all radio stations as hereinafter provided * * *"

47 U. S. C. §153(b) defines "radio communication" as "The transmission by radio of writing, signs, signals, pictures, and sounds of all kinds * * *". The television and radio industries have construed this definition to include television as "one form of radio transmission". There can be no doubt of the correctness of this construction. See, for example, the testimony of Lodge, a Columbia Broadcasting System engineer. Section 3(d) states that "Transmission of energy by radio" or "radio transmission means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds * * *" 47 U. S. C. §303(g) requires the Federal Communications Commission to study new uses for radio and both that body and its predecessor, the Federal Radio Commission, historically have exercised wide supervision over the development of television or "visual broadcasting" and have reported their work in this connection to Congress. The Communications Act of 1934 applies to every phase of television and it is clear that Congress intended the regulatory scheme set out by it therein to be exclusive of State action. See 47 U. S. C. §301, which recites the purpose of the act as, inter alia, the maintenance of "* * * the control of the United States over

all channels of interstate and foreign radio transmission * * *"

If there were any doubt respecting the intention of Congress in this respect, it would be set at rest by legislative history. Senate Report No. 781, discussing Senate Bill S. 3285, which later was enacted as the Federal Communications Act, stated, "The purpose of this bill is to create a communications commission with regulatory power over all forms of electrical communication. * * *" The language employed is so all inclusive as to leave no doubt but that it was the intention of Congress to occupy the television broadcasting field in its entirety. While section 410(a) provides for a measure of co-operation between the Federal commission and State regulatory bodies, it is clear that under the plan set out by that section the Federal commission remains the dominant regulatory force, members of the State regulatory bodies being engrafted, as it were, temporarily upon the Federal commission.

The Pennsylvania State Board of Censors contends in effect that the field of censorship was left open by the Federal Communications Act and therefore the State Board of Censors, as an exercise of State police power, may censor films used in television broadcasting. But, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 504, 582, the police power of a State consists of the exercise by a sovereign of the powers inherent in its "dominion" and the sovereignty of the Commonwealth of Pennsylvania cannot be exercised to censor motion picture films employed in television broadcasting because the broadcasting of films by television does not lie within the dominion of the Commonwealth. We cannot agree with the contention of the Board of Censors that censorship by the States is permitted under the act. While 47 U. S. C. §326, declares it to be a National policy that nothing in the act shall be understood to give the Federal commission "power of censorship" over

radio communications and that no regulation or condition shall be promulgated or fixed by the commission which shall interfere "with the right of free speech by means of radio communication", this does not mean that the State may exercise a censorship specifically denied to the Federal agency. Censorship may be defined as the forbidding of publication, i. e., prohibition of publication in advance of publication. The act itself demonstrates that Congress was vitally concerned with the nature of the programs broadcast as affecting the public good. It, therefore, dealt directly with the subject matter of the broadcasts which Pennsylvania seeks to regulate here. Congress thus set up a species of "program control" far broader and more effective than the antique method of censorship which Pennsylvania endeavors to effectuate in the instant case.

Five provisions of the Communications Act must be noted in this connection. 47 U. S. C. §308(b) provides for a careful check by the commission as to the character and responsibility of any person seeking to obtain a license to operate a broadcasting station. 47 U. S. C. §307(a) deals with applications for renewals of licenses. 47 U. S. C. §§309(b)(2) and 310(b) prohibit the assignment or transfer of a license without the written consent of the commission after it has secured full information respecting the responsibility of the assignee or transferee. 47 U. S. C. §303(m)(d), authorizes the commission to suspend the license of any operator upon proof that the licensee "* * * has transmitted * * * communications containing profane or obscene words, language or meaning * * *". Finally, section 326, now embodied in substance in 18 U. S. C. §1464, provides for the fining and imprisonment of any person who utters any indecent, obscene or profane language by means of radio communication.

It is clear from the foregoing that Congress was concerned with the contents of the programs of all broadcast-

ing stations, including television transmitting stations, and provided exemplary penalties, including loss of license and penal sanctions for the transgressor who should broadcast an indecent or obscene program. Congress did not intend to control in advance the broadcasting of radio programs but it did intend to prevent the transmittal of obscene matter through the ether. Program control was entrusted to the Federal commission and it is an effective one. In National Broadcasting Co. v. United States, 319 U. S. 190, 215-216, the Supreme Court said, "The act itself establishes that the commission's powers are not limited to the engineering and technical aspects of regulation of radio communication * * * It puts upon the commission the burden of determining the composition of that traffic". The subject need not be labored further. We think it is clear that Congress has occupied fully the field of television regulation and that that field is no longer open to the States. Congress possessed the constitutional authority to effect this result: Hines v. Davidowitz, 312 U. S. 52, 74. It follows that the Commonwealth of Pennsylvania cannot censor the films used on the programs of plaintiffs' stations.

The judgment will be affirmed.

End